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149355

SERVICES DIVISION

2012 MAY 30 A 5:35

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In re: Application of)
)
WPEO RADIO FOUNDATION, INC.)
)
For Minor Modification of the Facilities)
of FM Broadcast Translator Station)
)
W277AQ, Canton, Illinois)

File No. BPFT-20120413ACM
Facility ID 149355

FILED/ACCEPTED

MAY 25 2012

To: The Secretary
Attention: Chief, Audio Division, Media Bureau

Federal Communications Commission
Office of the Secretary

OPPOSITION TO JOINT INFORMAL OBJECTION

On May 11, 2012, Nelson Broadcasting, Inc. ("Nelson") and American Educational Foundation, Inc. ("AEFI," and together with Nelson, the "Petitioners") filed a Joint Informal Objection (the "Objection") to the application (FCC File No. BPFT-20120413ACM, the "Application") of WPEO Radio Foundation, Inc. (the "Foundation") for a minor modification of the facilities of FM radio broadcast translator station W277AQ, Canton, Illinois, FCC Facility ID 149355 (the "Station"). The Foundation hereby opposes the Objection.

Introduction

The Station has operated for a number of years in Canton on FM Channel 277 (103.3 MHz). However, the FCC has granted a permit (File No. BNPED-20100224ACL) to the Canton Seventh-Day Adventist Church for a new full service noncommercial educational FM radio broadcast station on Channel 277 in Canton. Consequently, the Station cannot remain on Channel 277 in Canton or vicinity. Thus, the Foundation proposes to relocate the Station to nearby Peoria, where it will provide nighttime coverage for heritage daytime AM station WPEO.

Inasmuch as the new Adventist station in Canton precludes use of Channel 277 in Peoria, the Foundation proposes to change the frequency of the translator to Channel 298 (107.5 MHz).

Petitioner AEFI is the licensee of FM broadcast translator station 277AT, currently licensed to Havana, Illinois. Two weeks ago, AEFI filed an application (File No. BALFT-21020510ACR) to sell station 277AT to co-Petitioner Nelson.

A month earlier, AEFI had filed an application (File No. 20120404AAW) to switch W277AT to Channel 298 in Havana and make other changes in its facilities. This proposal was premised on the same displacement imperative that is forcing W277AQ to relocate, namely the advent of the new full service station on Channel 277 in Canton. In AEFI's displacement application, however, AEFI did not disclose to the Commission that this was merely Stage One of a two-stage plan to move the translator to Peoria. On May 3, 2012, the Commission, none the wiser as to AEFI's larger ambitions, granted AEFI's request to change frequencies to Channel 298 in Havana. AEFI evidently completed the changes in a moment, as it filed a covering license application four business days later. See BLFT-20120510AAY.

Two days after that, AEFI filed a new application (File No. BPFT-20120511ABB) to use Channel 298 in Peoria instead of Havana. AEFI positioned this proposal as a minor change in the facilities of W277AT.

Havana is roughly 17 miles (29 km) south of Canton. Havana is 38 miles (61 km) southwest of Peoria, while Canton is only 25 miles (41 km) from Peoria. Similarly, the current transmitter site of W277AT is farther away from Peoria than that of W277AQ. Accordingly, AEFI's application presents a greater "hop" than the Foundation's proposal.

Unfortunately for AEFI, its most recent facilities modification application was filed four weeks *after* that of the Foundation. It is therefore barred from consideration by the Commission

-- unless AEFI can persuade the Commission to throw the Foundation's application out. In essence, Petitioners seek to prevent the Foundation from completing its modification of 277AQ so that they can achieve their own two-step modification of 277AT to occupy Channel 298 in Peoria.

Section 74.1233(a) of the Commission's Rules treats as a "minor change" any modification of the facilities of an FM translator where the new facility would provide service to some part of the area previously covered by 60 dBu contour of the previously-authorized facility. Since there is no opportunity to file applications for major changes in the facilities of FM translator stations at this time, classification as a minor change is necessary to consideration of AEFI's proposal.

AEFI's modification application acknowledges that the 60 dBu coverage contour of the current facilities of W277AT does not overlap with the 60 dBu contour of the proposed new facility in Peoria. Therefore, AEFI includes in its application a request for a waiver of Section 74.1233(a) of the Commission's Rules to allow its consideration as a "minor change" application. In seeking a waiver, it relies on the principles set forth in a decision by the Commission's Audio Division in *John E. Garziglia (Mattoon, Illinois)*, FCC DA 111-1495 (September 2, 2011), commonly referred to as the "Cromwell" case after the name of the applicant in BPFT-20101025ABR. The AEFI application alludes to its need for a "Cromwell Waiver," albeit with only the scarcest of support. AEFI notes only that the proposed 40 dBu (50,10) contour of the requested facility overlaps the 60 dbu contour of the current facility, and that the translator will rebroadcast AM station WOAM. See *Comprehensive Technical Statement* (Attachment 10 to AEFI's application) at unnumbered page 8.

It is therefore clear that AEFI's proposal, even if it had been submitted in a timely

fashion, could not be considered without a *Cromwell* waiver. Moreover, as noted above, AEFI's plan (when taken as a whole) is strikingly similar to that of the Foundation, except for the fact that the AM station that AEFI's translator proposes to rebroadcast at night already has nighttime authority, whereas WPEO does not. Yet notwithstanding the similarities between the two projects, AEFI hypocritically opposes the grant of such a waiver to the Foundation.

In this regard, *Cromwell* denounced the practice of using "serial modification applications" to accomplish by multiple minor change applications that a move would not be allowed in a single application. *Cromwell* at 3. If Petitioners were correct about the impropriety of the Foundation's one-step proposal (and fortunately they are not), under the teaching of *Cromwell*, AEFI's own "two-step" project would arguably constitute an abuse of the Commission's processes.

Cromwell Waiver

The basis for a grant of the Foundation's request for a *Cromwell* waiver is set forth in Exhibit 13 to the Application, which is incorporated herein by this reference. In summary, the Foundation referenced the four factors set forth in the Audio Division's decision in *Cromwell*: 1) The applicant had no history of serial minor modification applications; 2) the new facility is mutually exclusive with the licensed facility; 3) the move does not implicate concerns raised relative to LPFM preclusion; and 4) the translator would rebroadcast an AM station's programming. The Foundation showed that all of these factors apply to the Foundation's application, with the one twist that while the interfering contour of the new facility overlaps with the protected contour of the existing facility, they two are not, strictly speaking "mutually exclusive" because of the move away from the station's existing channel occasioned by the displacement mentioned in the Introduction, *supra*, at 1-2.

Indeed, no displacement facility in these circumstances could ever be mutually exclusive with the existing authorization. That is because the 60 dBu coverage contour of the existing translator is completely encompassed within the 60 dBu contour of the new Adventist station in Canton. See Exhibit 1 hereto. Thus, any proposal whose 40 dBu contour would overlap with the 60 dBu contour of the current W277AQ would also overlap with the protected 60 dBu contour of the Adventist station – and would be unacceptable for filing for that reason.

Nevertheless, the requirement for overlap of the 40 dBu contour of the facility proposed by an applicant seeking minor change treatment of an application to modify the facilities of an FM translator ensures that the relocation will not involve an unreasonable distance from the current site. Analysis of past FCC decisions shows that the Commission has routinely granted similar *Cromwell* waiver requests where there was overlap between the 60 dBu and 40 dBu contours of the licensed and proposed facilities.

For example, Vermont Public Radio proposed such a scenario involving FM translator station W223AV, Rutland, Vermont. See FCC File No. BPFT-20120403ACT (the “VPR Application”). In its application, VPR acknowledged that the existing 60 dBu contour of its translator W223AV did not overlap the 60 dBu contour of the proposed facilities. However, the 40 dBu interfering contour of the licensed facility *did* overlap the protected 60 dBu contour of the proposed facility. *Id.*

It is significant that the VPR application did not result from a displacement situation in the strict sense, but was prompted by the authorization of a new full-service FM educational station covering the area previously reached by the translator. Further, the VPR application did not offer the public interest benefit of providing nighttime coverage for a daytime-only AM station, as the Foundation’s proposal does.

Additionally, Way Media, Inc. recently received a *Cromwell* waiver in BPFT-20120316ADD for its FM translator station W279BE in Lynnville, Tennessee. The waiver allows W279BE to move, in one step, to a site from which the new 60 dBu contour would not overlap with that of the existing facility. The applicant noted that “the proposed W279BE facility is fully mutually exclusive with the licensed W279BE facility because the proposed 40 dBu (50,10) interfering contour overlaps the existing and licensed W279BE 60 dbu (50,50) contour....” *Id.* The application also featured the public interest benefit of providing nighttime service for the programming of daytime-only AM station WWLX.

The opportunity to make the programming of daytime AM radio stations at night has also been recognized as providing a substantial public interest benefit in connection with the processing of non-adjacent channel applications for modification of the facilities of FM translator stations. See the application of Extreme Grace Media, Inc., FCC File No. BPFT-20120308ABN, where the Commission allowed the licensee of K245AE to change locations (by over 20 km) and channel (coincidentally to channel 298) in order to rebroadcast AM station KGYM in Cedar Rapids, Iowa.

The Foundation’s AM station WPEO has long provided an important inspirational radio service to many thousands of listeners in central Illinois. Because of the unique facts of its allocation, it does not enjoy a protected nighttime authorization, and in all likelihood will never be able to broadcast at night with its AM facility. Allowing WPEO to extend its service on the FM band by use of translator W277AQ, as modified, will provide numerous public interest benefits and will answer the Commission’s policy directives in this area even more than the *Cromwell* decision. There, the AM station to be rebroadcast (WCRA) already had nighttime broadcast authority. WPEO does not.

The Commission's decision to allow FM translators to rebroadcast daytime-only AM stations offers hope to these stations, many of which, like WPEO, have provided local service superior to that offered by FM stations owned by mammoth groups. In making this decision, the Commission acknowledged that even though such AM stations "commonly provide unique, community responsive formats," they faced diminishing prospects. See *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, MB Docket No. 07-172, FCC 09-59, 24 FCC Rcd. 9642, para. 2 (2009). AM broadcast stations were in a losing battle with FM stations, satellite radio and Internet based audio services – all services that offer "higher technical quality and superior audio fidelity" than the AM service. *Id.*, at para. 3. This situation was especially bleak for daytime only stations as Daylight Savings Time was expanded in 2008, further hindering them from effectively competing in the marketplace. *Id.* The use of FM translators by daytime only stations was "the best way to help them provide consistent service throughout their predicted service area, both in daytime and nighttime hours." *Id.* at para. 9. The Foundation seeks to provide its audience with the benefits of this relief by rebroadcasting AM daytime only station WPEO on W277AQ. If granted, the proposal would allow WPEO to extend the times when its unique non-profit broadcasting service is available to its listeners.

Of course, this aspect of the Foundation's application is not the only factor whereby it is even more qualified for a waiver than the applicant in *Cromwell*. Significantly, none of the cases discussed above involved a displacement situation. However, there are sound reasons why the displacement aspect of the instant application provides the "other legitimate justification for limiting the ability" of third parties to compete for the use of the facilities proposed by the Foundation here, as suggested in *Cromwell*, *supra*, at 4.

Displacement Waivers

Petitioners argue that the Commission cannot grant displacement relief to Station W277AQ to move to Channel 298 because, they say, to do so would circumvent Ashbacker.¹ This is plainly false. The Commission has long recognized the need for displacement relief for FM translator licensees, and has consistently given such relief priority over the inchoate, unknown desires of potential third party applicants.

Notably, the agency has granted several proposals similar to that proposed by the Foundation even though, due to the exigencies of a displacement situation, the new facilities were not mutually exclusive with the displaced ones. The chief reason for this is obvious: Where a translator is displaced, virtually any facility that would be mutually exclusive with the old facilities of the translator would also be blocked by the new authorization displacing it. To require strict mutual exclusivity as a precondition of minor change treatment would be tantamount to barring displacement relief altogether.

Consequently, the Audio Division has frequently granted waivers of the restrictions normally applied to minor change proposals to the licensees of FM translator stations seeking displacement relief. A few examples of such grants follow:

- The Division granted a waiver of Section 74.1233(a)(1) to allow University of Northern Iowa to modify K269EJ, Des Moines, Iowa to specify Channel 249. See FCC File No. BPFT-20100512AEQ.
- WTBO-WKGO Corporation, L.L.C., received a waiver of Section 74.1233(a)(1) to move W253AB, Cumberland, Maryland to Channel 289. See FCC File No. BPFT-20120426ACO.
- Canyon Media Group, L.L.C., received a waiver of the same Section to move station K268BH, Mesquite, Nevada to Channel 294. See FCC File No. BPFT-20120314ABY.

¹ *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

Petitioners' wailing about the alleged impropriety of a displacement waiver is disingenuous. As noted above, Petitioner AEFI recently requested -- and received -- a displacement waiver for W277AT. See FCC File No. BPFT-20120404AAW. In that application, Petitioner AEFI simply stated that it "request[ed] a waiver to a non-MX channel due to displacement by Construction Permit BPNED-20100224ACL [*sic*], which is co-channel to the present operation [of W277AT]." That was it. AEFI offered no analysis showing why *Ashbacker* should not apply to that situation. AEFI offered no string of citations demonstrating that other displacement proposals had been approved under similar circumstances. By implication, AEFI was taking the position that the need for displacement relief trumped the need to open Channel 298 to other parties for an *Ashbacker* free-for-all, and that the filing protection it desired at that time was a routine matter. That position is actually correct, but it undermines the high dudgeon which Petitioners affect in opposition to the Foundation's proposal.

The Commission granted the application of AEFI for use of Channel 298 in Havana, as with innumerable other applications prompted by the demands of a displacement situation. Petitioners have not cited a single case where displacement relief was disallowed because the new facilities were not, strictly speaking, mutually exclusive with the existing authorization. Thus, Petitioner's own actions show that there would be no harm to third parties from a grant of the Application. The relief requested by the Foundation simply allows station W277AQ to continue broadcasting notwithstanding the arrival of a new full service station on its frequency, while at a new location W277AQ will fulfill the additional public interest goal of extending service by WPEO into the nighttime hours. In contrast, Nelson's station WOAM already has nighttime authority.

Further, note 5 to the *Cromwell* decision observed that in the context of non-adjacent

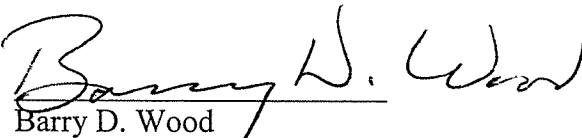
channel upgrades for FM stations, mutual exclusivity is not required “where there is a demonstration that another equivalent channel is available for other parties.” While it was not necessary for the Audio Division to rely on this aspect of the Cromwell proposal in order to waive the major change rule, it may be significant here to note that if other parties wish to file for FM translator facilities in the area to be served by the Foundation through W277AQ, 106.3 MHz and 106.5 MHz are available for that purpose. See Exhibit 2. Accordingly, there can be no worry that a grant of the Foundation’s application will implicate *Ashbacker*.

Conclusion

Petitioners have failed to provide sufficient support for their request to have the Commission dismiss the Application. Their Objection is the result of “sour grapes” in their own failure to file a timely, straightforward application to relocate translator station W277AT to Peoria. As they are second-in-time filers, Petitioners filed the Objection in the transparent attempt to have the Application dismissed. Unfortunately for the Petitioners, the Foundation filed its proposal first, thereby precluding the relocation of W277AT to Peoria.

Respectfully Submitted,

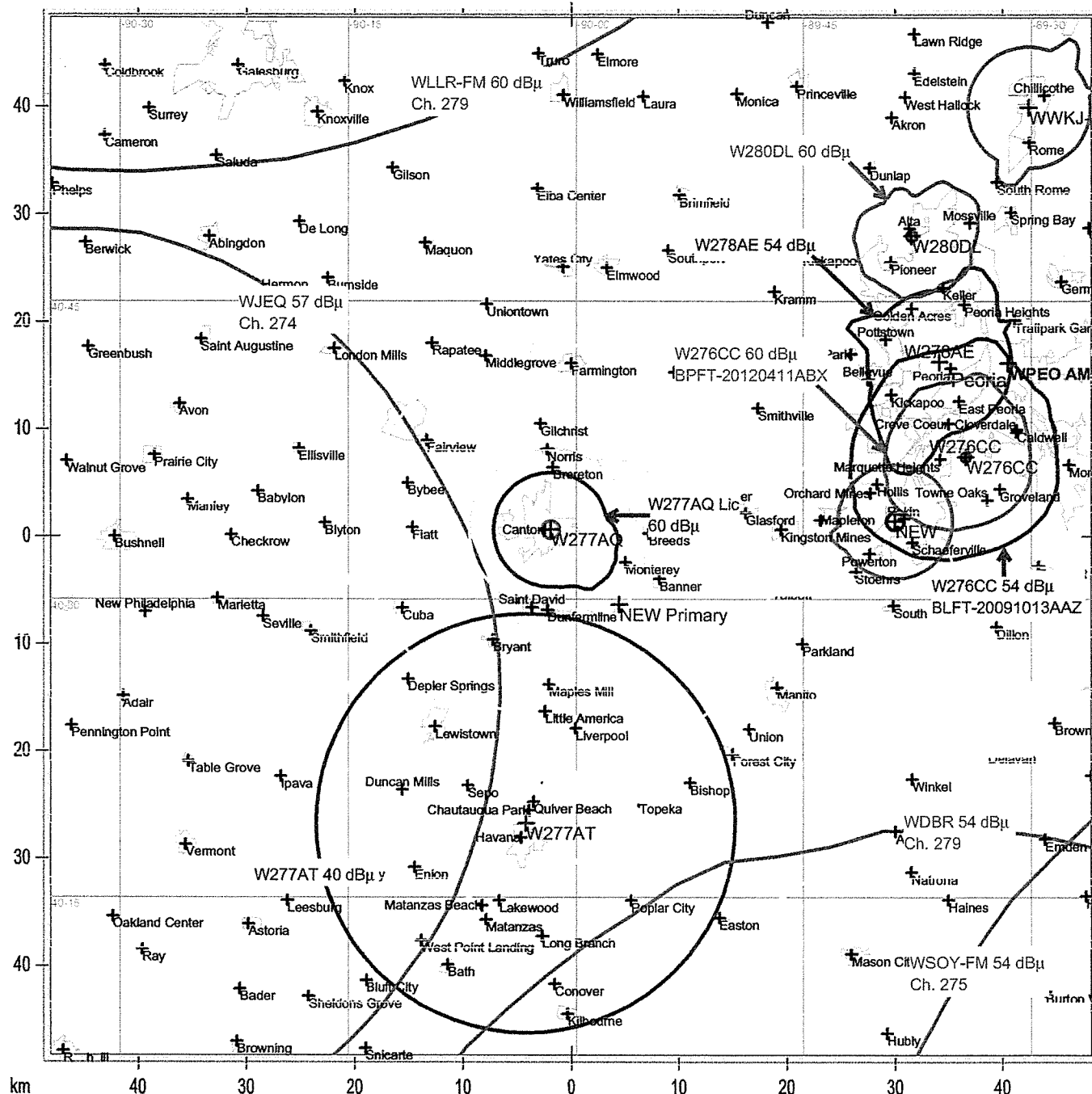
WPEO RADIO FOUNDATION, INC.

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Date: May 25, 2012

W277AQ Licensed Site in Relation to Surrounding Stations - Ch. 277 (103.3 MHz)

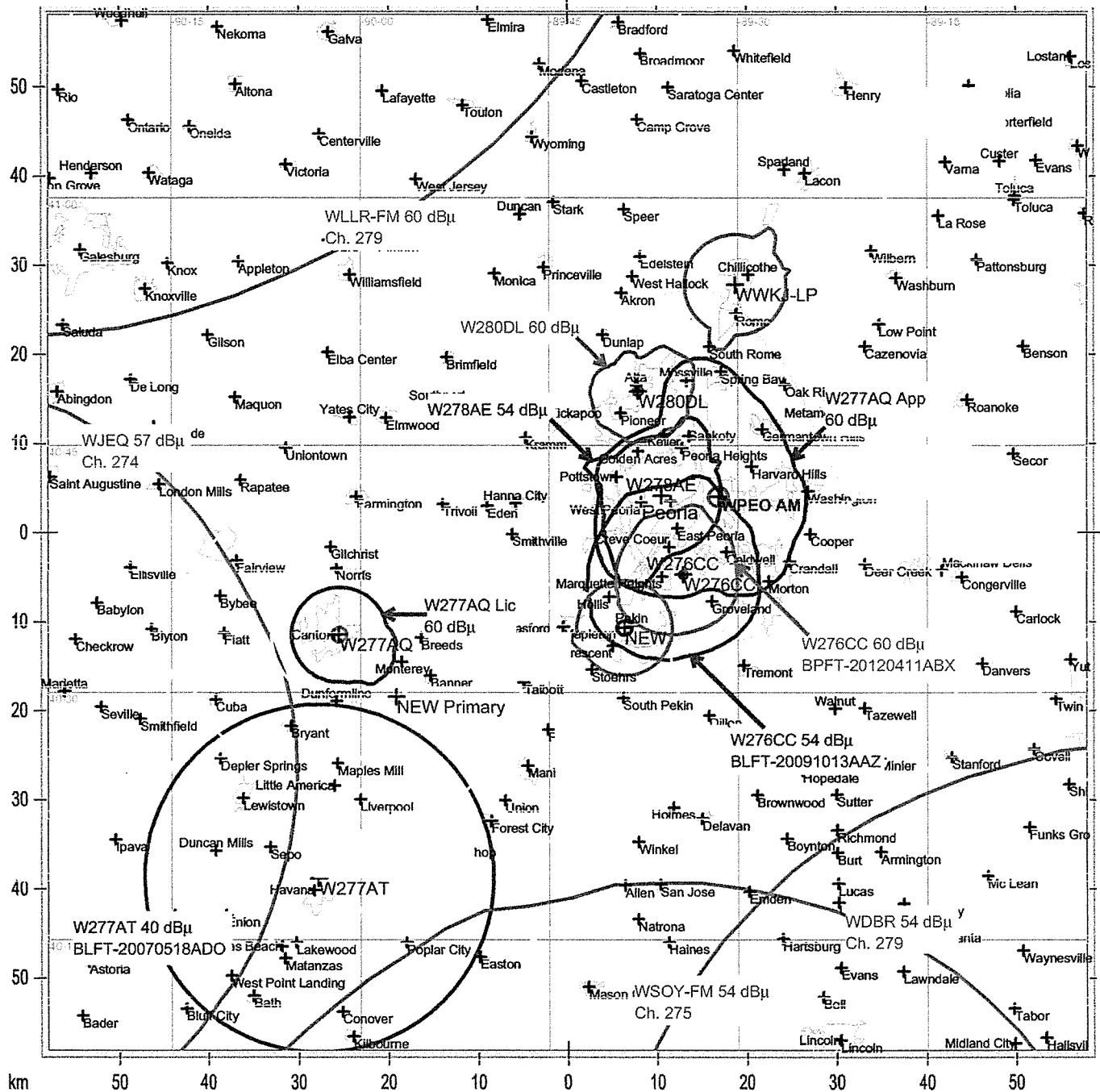


State Borders City Borders Lat/Lon Grid

Map Scale: 1:536150 1 cm = 5.36 km V/H Size: 96.60 x 96.27 km

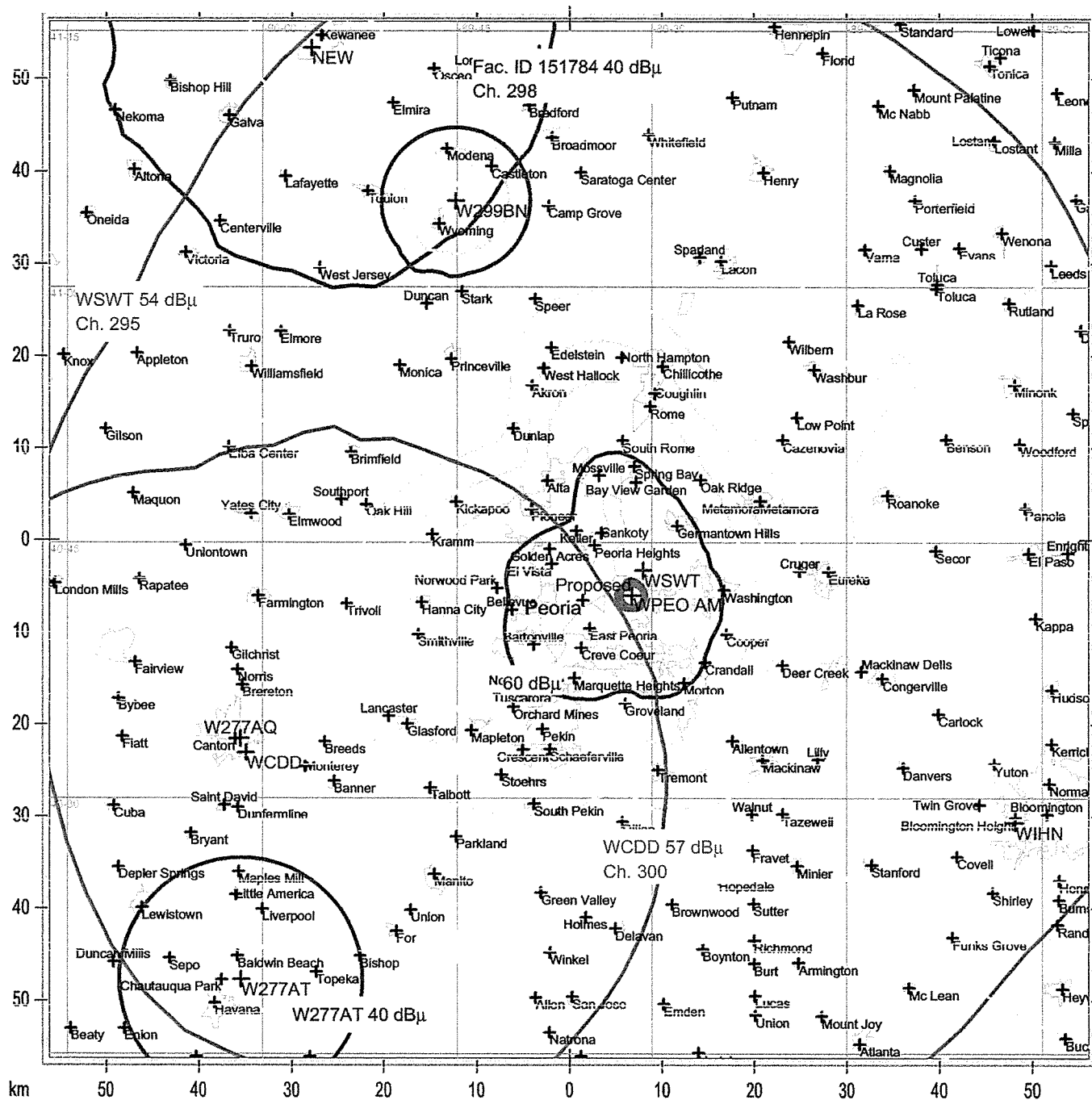
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W277AQ overlap with Surrounding Stations - Ch. 277 (103.3 MHz)



 State Borders
 City Borders
 Lat/Lon Grid

W277AQ - Application BPFT-20120413ACM in Relation to Surrounding Stations - Ch. 298 (107.5 MHz)



 State Borders
 City Borders
 Lat/Lon Grid

ENGINEERING NARRATIVE

Attached hereto are three maps demonstrating why channel 298 was chosen as an appropriate replacement channel within Peoria, IL on the WPEO AM tower, for W277AQ Facility ID 149355 (BPFT- 20120413ACM).

Shown on Map 1:

NEW Primary, recently granted CP, which is co-channel to W277AQ and overlaps nearly entirely the 40 dBu contour of W277AQ with its 60 dBu contour. When licensed the NEW Primary, 184672, Canton, OH CP will force a shutdown or move of co-channel translator W277AQ.

1st adjacent translator W276CC broadcasts from the south side of Peoria. This translator's 60 dBu cannot be overlapped by the 54 dBu of a 1st adjacent. Thus, channel 277 would overlap heavily from the WPEO AM tower. The licensee of W276CC has recently filed a minor modification application to the license of W276CC (BPFT-20120411ABX), which is still pending, requesting a channel change to 274. At grant of this application the 60 dBu of a 1st adjacent (277) must protect the 100 dBu of this new channel. This particular filing is the only redemptive help to channel 277, while the further points shown below still preclude the use of channel 277.

The 1st adjacent translator W278AE 54 dBu contour cannot be met or overlapped by a 1st adjacent 60 dBu contour. Therefore channel 277 could not be used at the WPEO tower or anywhere within Peoria city limits to serve WPEO, and meet the AM translator rules.

The W280DL 60 dBu contour on the north side of Peoria is a 3rd adjacent to channel 277. This translator could work with W277AQ at the WPEO tower were it not for W276CC and W278AE. However, this one is shown to demonstrate that not much move is available on channel 277 because the 60 dBu contour of a 3rd adjacent cannot overlap the 100 dBu contour of another 3rd adjacent.

Map 2:

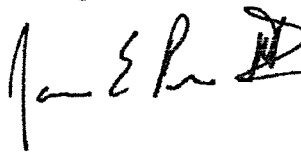
This map is identical to maps 1 and 3, except that we have moved the W277AQ to the WPEO AM tower and kept it on channel 277. You can see prohibited overlap as filed with W278AE and W276CC (both the current license and pending application), and prohibited overlap of the 60 dBu contour of WIVQ in the NE corner of the W277AQ 40 dBu contour.

Map 3:

This map demonstrates channel 298 meets all FCC rules with no overlap. This includes compliance with rule §74.1204(d) to WSWT's 54 dBu contour.

I declare under penalty of perjury that, to the best of my knowledge and belief, the foregoing is true and correct. Executed May 25, 2012.

Sterling Communications, Inc.



By: _____

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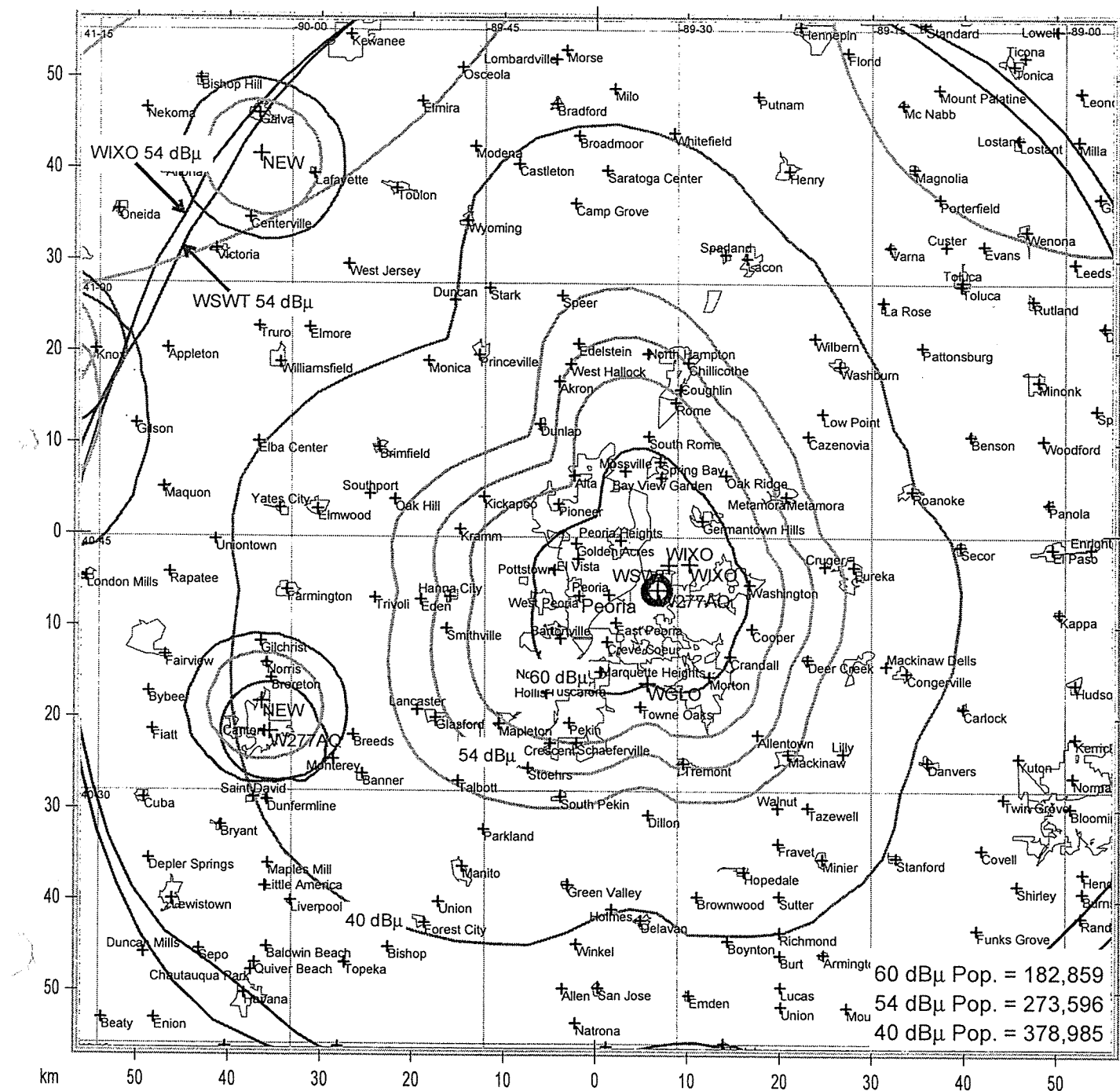
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W277AQ - Proposed New Channel in Relation to Surrounding Stations - Ch. 292 (106.3 MHz)



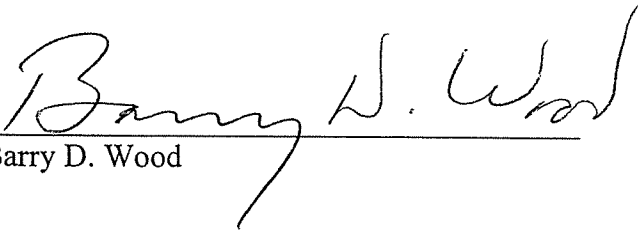
40-41-53.0 N
89-31-31.0 W
ERP = 250 W
ARC = 70 m
tower reg. 1010034

Certificate of Service

I, Barry D. Wood, hereby certify that I have served on this 25th day of May, 2012, a copy of the foregoing Opposition to Joint Informal Objection on the following parties by first-class mail, postage pre-paid:

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Barry D. Wood